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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-601

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Petitioner.

vs.

INTERSTATE COMMERCE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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and

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IN THE

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October Term, 1974

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—o—

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION,
Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

The petitioner Chicago, Rock Island and Pacific Railroad Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on July 24, 1974.

—o—

OPINION BELOW

The opinion of the Court of Appeals, reported at 501 F. 2d 908 (8th Cir. 1974), is printed as Appendix B hereto. The unreported opinion of the District Court for the District of Nebraska is printed as Appendix A hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on July 24, 1974. A timely petition for rehearing *en banc*, printed herein as Appendix D, was denied on August 27, 1974, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether a United States District Court may invoke the doctrine of primary jurisdiction and dismiss an action to enjoin an alleged unlawful abandonment of a railroad line brought pursuant to 42 U. S. C. § 1 (18) and § 1 (20), when such action would require judicial resolution of issues which are within the special expertise of the Interstate Commerce Commission and such issues are actually before the Commission in a pending abandonment application.

2. Whether, in light of 49 U. S. C. § 1 (16) as amended by Title VI of the Regional Rail Reorganization Act of 1973, § 601 (c), the financial inability of a rail carrier

to restore service on a branch line damaged by natural forces constitutes an "unlawful abandonment" within the meaning of 49 U. S. C. § 1 (18) and (20).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 49:

§ (16) *Rerouting of traffic on failure of initial carrier to serve public.*

(b) Whenever any carrier by railroad is unable to transport the traffic offered it because—

(1) its cash position makes its continuing operation impossible;

(2) it has been ordered to discontinue any service by a court; or

(3) it has abandoned service without obtaining a certificate from the Commission pursuant to this section;

the Commission may, upon the same procedure as provided in paragraph (15) of this section, make such just and reasonable directions with respect to the handling, routing, and movement of the traffic available to such carrier and its distribution over such carrier's lines, as in the opinion of the Commission will best promote the service in the interest of the public and the commerce of the people subject to the following conditions:

(A) Such direction shall be effective for no longer than 60 days unless extended by the Commission for cause

shown for an additional designated period not to exceed 180 days.

(B) No such directions shall be issued that would cause a carrier to operate in violation of the Federal Railroad Safety Act of 1970 (45 U.S.C. 421) or that would substantially impair the ability of the carrier so directed to serve adequately its own patrons or to meet its outstanding common carrier obligations.

(C) The directed carrier shall not, by reason of such Commission direction, be deemed to have assumed or to become responsible for the debts of the other carrier.

(D) The directed carrier shall hire employees of the other carrier to the extent such employees had previously performed the directed service for the other carrier, and, as to such employees as shall be so hired, the directed carrier shall be deemed to have assumed all existing employment obligations and practices of the other carrier relating thereto, including, but not limited to, agreements governing rate of pay, rules and working conditions, and all employee protective conditions commencing with and for the duration of the direction.

(E) Any order of the Commission entered pursuant to this paragraph shall provide that if, for the period of its effectiveness, the cost, as hereinafter defined, of handling, routing, and moving the traffic of another carrier over the other carrier's lines of road shall exceed the direct revenues therefor, then upon request, payment shall be made to the directed carrier, in the manner hereinafter provided and within 90 days after expiration of such order, of a sum equal to the amount by which such cost has

exceeded said revenues. The term "cost" shall mean those expenditures made or incurred in or attributable to the operations as directed, including the rental or lease of necessary equipment, plus an appropriate allocation of common expenses, overheads, and a reasonable profit. Such cost shall be then currently recorded by the carrier or carriers in such manner and on such forms as by general order may be prescribed by the Commission and shall be submitted to and subject to audit by the Commission. The Commission shall certify promptly to the Secretary of the Treasury the amount of payment to be made to said carrier or carriers under the provisions of this paragraph. Payments required to be made to a carrier under the provisions of this paragraph shall be made by the Secretary of the Treasury from funds hereby authorized to be appropriated in such amounts as may be necessary for the purpose of carrying out the provisions hereof.

§ 1 (18). *Extension or abandonment of lines; certificate required; contracts for joint use of spurs, switches, etc.*

After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or

extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

§ 1 (20). *Issuance of certificate by Commission; unlawful extension or abandonment of lines.*

The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any

carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

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STATEMENT OF THE CASE

On March 2, 1973, the petitioner Chicago, Rock Island and Pacific Railroad Company (Rock Island) issued an embargo notifying patrons that rail service on its branch line from Fairbury to Ruskin, Nebraska, a distance of thirty-nine miles, would be suspended due to unsafe track conditions. On May 21, 1973, the petitioner filed with the Interstate Commerce Commission (ICC) an application for permission to permanently abandon the line. On August 22, 1973, the Interstate Commerce Commission filed an action in the United States District Court for Nebraska alleging that the embargo of the Ruskin line was an unlawful abandonment within the meaning of 49 U.S.C. § 1 (18) and seeking to enjoin same under 49 U.S.C. § 1 (20). The ICC also filed a Motion for a Preliminary Injunction.

In response to the Complaint and Motion for Preliminary Injunction, the Rock Island filed a Motion seeking dismissal of the action on the ground that the court lacked jurisdiction over the subject matter in the absence of an initial factual determination by the Commission itself under the doctrine of primary jurisdiction; in the alternative, the Rock Island's motion sought a stay of the proceedings

pending determination of factual issues by the ICC. The court deferred ruling on the Rock Island's motion until after the hearing on the motion for preliminary injunction.

The hearing was held from October 15-18, 1973, in United States District Court in Lincoln, Nebraska. Evidence presented at this hearing showed that for several years prior to March 12, 1973, the Ruskin line had presented a dilemma to the Rock Island's Operating Department. On the one hand, the line was in poor physical condition despite the fact that it received maintenance at least commensurate with that allotted to similar lines on the Rock Island system. Indeed, the condition of the track was such that major rehabilitation requiring massive expenditure was inevitable at some time in the future. However, in the judgment of the Rock Island's Operating Department, such expenditure could not be justified in light of present or potential traffic on the line. As long as the major rehabilitation expenses were not incurred, the line continued to show a marginal profit, thereby making ICC approval of an application to permanently abandon unlikely under then existing regulations and accounting methods. Thus, the Rock Island's dilemma: either (1) expend a large sum of money to rehabilitate the line, causing it to become unprofitable and insuring approval of an abandonment application; or (2) continue maintenance at minimal levels, knowing that at some point major rehabilitation would be required to keep the line operable. The Rock Island management chose the latter course, largely due to the poor overall financial condition of the railroad. Early in 1973, a number of developments including a change in ICC regulations relating to abandonment of branch lines caused the Rock Island management to re-

assess the feasibility of filing an abandonment application with the ICC, and this was subsequently done. Meanwhile, the track conditions on the Ruskin line had become extremely bad due to abnormal temperature fluctuation and precipitation during the winter of 1972-73. These conditions necessitated the March 12, 1973 embargo. By the time that the roadbed had dried out to the point where repairs could be begun in June or July of 1973, the Rock Island decided not to undertake the repairs due to the fact that anticipated approval of the abandonment application would make the expenditure unnecessary. The cost of rehabilitation to meet minimum safety standards was shown to be $558,738.00 in October of 1973.

After submission of the evidence the district court on October 29, 1973 granted the Rock Island's Motion to Dismiss, subject to reinstatement in the event of disapproval of the still pending abandonment application. (See Appendix A.) In so ruling, the court stated:

> Thus, whether I take the course of invoking the primary jurisdiction doctrine or that of retaining jurisdiction and refusing to enjoin, the principal result is the same—the Interstate Commerce Commission will judge the wisdom of abandonment before a court orders restoration. I think that result is eminently sensible.
>
> Largely because I want the Interstate Commerce Commission to have a free hand in exploring and deciding the policy issue, I choose to rely upon the doctrine of primary jurisdiction, make no more findings of fact than absolutely necessary, and dismiss the actions subject to reinstatement if the Interstate Commerce Commission does not authorize abandonment and if the plaintiffs then want reinstatement for injunctive purposes.

> Invocation of the doctrine of primary jurisdiction is justified. The evidence demonstrates that the special expertise of the Interstate Commerce Commission will be highly useful in resolving issues of the effect on shippers using the Fairbury-Ruskin line of cessation of service, the effect on the railroad company of cessation of service, the probable cost of restoration to comply with current legal standards, the financial ability of the railroad company to bear that expense, and the comparative needs of shippers in other parts of the country whose service may be affected by an outlay of restorative funds for the Fairbury-Ruskin line.

The ICC appealed the district court's decision to the U. S. Court of Appeals for the Eighth Circuit. In its opinion, the Court of Appeals held that the dismissal was error because the doctrine of primary jurisdiction had no application to the question of whether there had been an "unlawful abandonment violative of § 1 (18)." The Court of Appeals remanded the case to the district court with instructions to make findings of fact and determine whether an injunction should issue pursuant to § 1 (20).

Following denial of the Rock Island's petition for rehearing, the Court of Appeals issued its mandate remanding the case to the district court for further proceedings consistent with the court's opinion. (See Appendix C.) On October 31, 1974, the district court indicated in a memorandum (Appendix F) that it had reconsidered the record and determined that a preliminary injunction should issue. Counsel for the ICC was instructed to prepare the preliminary injunction, which has not been entered to date. To date, the ICC has not ruled on the pending abandonment application.

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REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals conflicts with applicable decisions of this Court by placing an unduly narrow and restrictive interpretation on the doctrine of primary jurisdiction and reaching a result inconsistent with the underlying principles of the doctrine.

In its opinion, the Court of Appeals recognized that this Court's interpretation of 49 U. S. C. § 1 (18) and 1 (20) in *Texas and P. Ry. Co. v. Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266 (1926), and *Thomson v. Texas Mexican Ry.*, 328 U. S. 134 (1946) was not directly applicable to the instant case. Those cases involved unauthorized extensions of railroad lines, and contain language which arguably denies discretion to withhold an injunction once a violation of § 1 (18) is found. In departing from these holdings, the Court of Appeals determined that:

> In cases where a court has been confronted with physical impossibility of operation without substantial expenditures for repair, the determination as to whether to issue an injunction has been viewed as one of equity, whether it would be equitable to require substantial expenditures when shortly thereafter the Commission may approve the railroad's abandonment application. 501 F. 2d at 914.

In so holding, the Court of Appeals followed the view expressed in several recent cases, including *Pennsylvania v. Penn Central Transportation Co.*, 348 F. Supp. 28 (M. D. Pa. 1972), *aff'd.* 475 F. 2d 1394 (3d Cir. 1973); *Asbury v. Chesapeake and Ohio Ry. Co.*, 264 F. Supp. 437 (D. D. C. 1967); and *Myers v. Arkansas & O. Ry. Co.*, 195 F. Supp. 36 (W. D. Ark. 1960).

The Court of Appeals also referred to the generally accepted scope of the doctrine of primary jurisdiction, as articulated in this Court's decision in *United States v. Western Pacific Ry. Co.*, 352 U. S. 59, 63-64 (1956):

> Primary jurisdiction, "* * * applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views."

Given this framework, the Court of Appeals reached a conclusion inconsistent with its distinction of *Texas and P. Ry., supra*, and its adherence to *Western Pacific Ry., supra*. The court found that the district court's application of the doctrine of primary jurisdiction was error, since the only question before it was "whether there has been an abandonment within the intendment of § 1 (18)." 501 F. 2d at 913.

In so holding, the Court of Appeals apparently disregarded the clear holding of the *Western Pacific* case that the doctrine of primary jurisdiction is applicable to situations in which "enforcement of the claim" requires the resolution of factual issues which fall within the special competence of an administrative body. The Court of Appeals, having found as a matter of law that there had been a violation of § 1 (18), remanded to the district court with instructions to make findings of fact relating to "enforcement," i.e., whether equity compels issuance of an injunction. These issues include the effect of cessation of service on shippers and on the railroad, the actual condi-

tion of the branch line and the probable costs of restoration, the financial ability of the railroad to bear such costs, and the effect on shippers on other lines within the system if the railroad is ordered to make such expenditures.[1] These are clearly issues that are within the special expertise of the ICC as noted by the district court in its Memorandum Opinion (see Appendix A), and the Court of Appeals acknowledges that these issues are actually before the Commission in the pending abandonment application. 501 F. 2d at 913, n. 4.

The history of the doctrine of primary jurisdiction as it has evolved in the decisions of this Court clearly demonstrates the doctrine's applicability in all situations where an issue of fact is cognizable in both court and administrative agency, but its nature is such that determination by the agency in the first instance is compelled. The opinion of the Court of Appeals in the instant case is inconsistent with this Court's holding in *Western Pacific*, *supra*, in that the doctrine is held inapplicable to factual issues arising in the course of enforcing the claim; *i. e.*, the district court's determination of whether the equities justify the issuance of an injunction pursuant to § 1 (20). The petitioner respectfully submits that this inconsistency should be resolved by this Court in order to preserve the viability of the doctrine of primary jurisdiction.

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1 The Interstate Commerce Act clearly contemplates a balancing of the benefit which may accrue to a small group of shippers as the result of the ICC compelling a carrier to take or refrain from taking some specific action, against the harm which may correspondingly accrue to the broader shipping public not directly affected by the ICC's action. See, **e.g.** 49 U. S. C. Sec. 1 (21), permitting the ICC to compel additional car service and extension of a line only "if the expense involved therein will not impair the ability of the carrier to perform its duty to the public."

2. The failure of the Court of Appeals to consider the effect of the 1973 amendment to 49 U. S. C. § 1 (16) on the operation of § 1 (18) and § 1 (20) under the factual circumstances existing in the instant case presents an important question of federal law which has not been but should be settled by this Court.

Title VI of the Regional Rail Reorganization Act of 1973, § 601 (e), amends § 1 (16), of the Interstate Commerce Act, 49 U. S. C. § 1 (16) by providing a procedure whereby the ICC may by its own motion, order another carrier to provide temporary rail service on a line where there has been a cessation of such service, because: (1) the owner of the affected line has a cash position which makes continuing operation impossible; or (2) the owner has been ordered to discontinue service by a court; or (3) the owner has abandoned service without obtaining a certificate from the ICC. The scope of this amendment has been unclear. Until July 11, 1974, well after briefs were submitted and arguments completed in the Court of Appeals, it was generally concluded that the amendment was directed toward the areas in the Northeast and Midwest where seven bankrupt railroads are operating. This conclusion was fostered by Senate Report No. 93-601 concerning the Regional Rail Reorganization Act of 1973 (1973 U. S. Code Cong. and Adm. News 3292). However, on July 11, 1974, the Interstate Commerce Commission in Ex Parte No. 293 (SUB-NO. 3), (printed herein as Appendix E) appears to have taken the position that the legislation applies to all Class I and Class II railroads in the United States, thus including the petitioner.

In its Petition for Rehearing filed in the Court of Appeals, the Rock Island requested that the Court con-

sider the impact of this new legislation on interpretation of § 1 (18) and § 1 (20) under the facts of the instant case. The Court of Appeals apparently saw fit not to do so.

The *petitioner respectfully submits that this new legislation* may have a profound effect upon the application of § 1 (18) and § 1 (20) in a factual situation such as that presented in this case, where a branch line is taken out of service due to physical deterioration, and the carrier's overall financial condition makes restoration during the pendency of an abandonment application economically unfeasible. Congress has now created a middle ground between cessation of operations by a financially distressed railroad, leaving affected shippers without service, and court-ordered restoration of service which would have the likely effect of plunging the distressed railroad into an even deeper financial abyss. By directing another carrier to provide temporary service on the affected line, the ICC can provide short term relief to shippers as well as to the distressed carrier. The procedure has obvious long term benefits as well, since by approving capital improvement and deferred maintenance expenditures to be compensated by the federal treasury, the ICC can initiate a program of up-grading of the line without financial hardship to the carrier, thereby increasing the possibility that at some future date the carrier can restore service on a permanent basis.

Moreover, the new legislation may well cast an entirely different light on the threshhold question of whether there has been an "unlawful abandonment" in the instant case. While not entirely clear in its rationale, the opinion in *Meyers v. Jay Street Connecting Railroad*, 259 F. 2d 532 (2d Cir. 1958) has been cited for the proposition that the

financial inability of a carrier to provide service on a line does not make cessation of service involuntary, and therefore not an "unlawful abandonment" in the sense of involuntary cessation of service due to *force majeure*. An analysis of the parties to the action and the language of the Court in regard to the parties other than the carrier does not lead one to the conclusion that *Meyers v. Jay Street Connecting Railroad, supra*, stands for the stated proposition. The effect of such a holding is obviously harsh, in light of the financial difficulties facing many modern railroads and the practical problems of attempting to force a railroad to spend money it does not have to restore service on a line. Thus, in enacting the amendment to § 1 (16) by providing an avenue of relief for shippers affected by such cessations of service apart from the § 1 (20) injunction procedure, Congress has acted to counter the harsh result of the *Jay Street* decision in a manner that will protect the interests of shippers and distressed carriers alike. The amendatory language clearly distinguishes between cessation of service because of a cash position which makes operation impossible and abandonment within the meaning of the Act. The amended language provides:

> (b) Whenever any carrier by railroad is unable to transport the traffic offered it because—(1) its cash position makes it continuing operation impossible; (2) * * *; or (3) it has abandoned service without obtaining a certificate from the Commission pursuant to this section; (Sect. 1 (16) (b) (1) (2) & (3)).

Unless impossibility of operation caused by a carrier's cash position falls short of an abandonment within the meaning of §§ 1 (18) (19) & (20) of the Act, the language of subsection (b) (1) is superfluous or at best redundant and repetitive. Obviously an involuntary cessation of

service caused by a deficient cash position does not constitute, in the opinion of Congress, an "unlawful" abandonment.

In addition, this legislation may well affect the operation of the doctrine of primary jurisdiction in cases such as this; Congress has arguably acted to fill the void left by referring questions as to the future of a line to the ICC. While the ICC considers these questions, shippers may now be served on a short term basis by a designated carrier, and the financially troubled railroad can be spared the absurd possibility of spending an enormous sum on restoration which may prove futile if an abandonment application is subsequently approved by the ICC.

Given the far-reaching implications of this new legislation and the widespread national problem created by financially troubled railroads, the petitioner respectfully submits that an important question of federal law is raised which has not been and should be settled by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV73-L-244

INTERSTATE COMMERCE COMMISSION,
Plaintiff.

vs.

CHICAGO, ROCK ISLAND, AND PACIFIC RAILROAD COMPANY and WILLIAM J. DIXON,
Defendants.

CV73-L-170

NEBRASKA PUBLIC SERVICE COMMISSION,
Plaintiff.

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY and PETER KIEWIT, Chairman of the Board, THEODORE E. DESCH, Vice Chairman of the Board and Chief Executive Officer, and WILLIAM J. DIXON, President,
Defendants.

MEMORANDUM OF DECISION

APPEARANCES: FOR plaintiff Interstate Commerce Commission, Lawrence W. Chamblee and Daniel E. Wherry

For plaintiff Nebraska Public Service Commission, John Finnegan

For defendants, C. Arlen Beam and Kenneth Stephan

URBOM, Chief Judge

The Interstate Commerce Commission and the Nebraska Public Service Commission in consolidated actions seek an injunction against the Chicago, Rock Island and Pacific Railroad Company to require it to restore rail serv-

ice on a branch line between Fairbury and Ruskin, Nebraska. Basically, the claim is that the railroad company has abandoned operation of the branch line without gaining the prior approval of the Interstate Commerce Commission, thereby violating 49 U. S. C. § 1 (18).

Jurisdiction is predicated upon 29 U. S. C. § 1 (20), granting a court authority to enjoin an abandonment which is contrary to 49 U. S. C. § 1 (18).

Previously, I overruled a motion to dismiss in the suit filed by the Nebraska Public Service Commission. The motion rested on an assertion that the primary jurisdiction doctrine dictated that the Interstate Commerce Commission should have the initial jurisdiction. I ruled that the evidence then before me was too sparse to enable me to say that the Commission should determine the issues. Thereafter, a similar motion was made by the defendant railroad company in the suit filed by the Interstate Commerce Commission, and decision on it was reserved until a hearing of evidence. Evidence on that motion and on the request for a preliminary injunction now has been received from all parties.

Cessation of service on the Fairbury-Ruskin branch line began on March 2, 1973. For at least two and a half years before that the railroad company had contemplated an abandonment, but doubted that it could persuade the Interstate Commerce Commission to authorize an abandonment, because the line persistently showed a profit, even though a reason for the profit was a failure to spend substantial amounts on track maintenance. Financial problems plagued the railroad company and it held expenditures for maintenance to a minimum across much or

all of its system. An unusually wet and warm winter in 1972-1973 led to unsafe track conditions and the cessation of service on March 2, 1973. Shortly thereafter the company concluded that the substantial expense required to restore the branch line was not warranted and on May 21, 1973, filed an application with the Interstate Commerce Commission for authority to abandon the line. That application is pending.

Upon consideration of the evidence the only serious question I have is whether to apply the primary jurisdiction doctrine and dismiss these actions subject to reinstatement if the Interstate Commerce Commission refuses to authorize abandonment, or to decline to enter a preliminary injunction on the basis that the money required to be spent for restoration would not be justified in equity until the Interstate Commerce Commission determines whether an abandonment should be permitted. Without wanting to bind the Commission to my factual findings, I am inclined to the view that there has been an unlawful abandonment—not as of March 2, 1973, but as of about May or June, 1973, when weather conditions would have permitted a restoration but the railroad company decided not to restore it for financial reasons. Nevertheless, I am also persuaded that an injunction should not issue at this time because of what probably would be an enormous expenditure for a restoration that may or may not prove to be wasteful, depending upon whether the Commission hereafter decides that the line should be abandoned.

Thus, whether I take the course of invoking the primary jurisdiction doctrine or that of retaining jurisdiction and refusing to enjoin, the principal result is the same—the Interstate Commerce Commisison will judge the

wisdom of abandonment before a court orders restoration. I think that result is eminently sensible.

Largely because I want the Interstate Commerce Commission to have a free hand in exploring and deciding the policy issue, I choose to rely upon the doctrine of primary jurisdiction, make no more findings of fact than absolutely necessary, and dismiss the actions subject to reinstatement if the Interstate Commerce Commission does not authorize abandonment and if the plaintiffs then want reinstatement for injunctive purposes.

Invocation of the doctrine of primary jurisdiction is justified. The evidence demonstrates that the special expertise of the Interstate Commerce Commission will be highly useful in resolving issues of the effect on shippers using the Fairbury-Ruskin line of cessation of service, the effect on the railroad company of cessation of service, the probable cost of restoration to comply with current legal standards, the financial ability of the railroad company to bear that expense, and the comparative needs of shippers in other parts of the country whose service may be affected by an outlay of restorative funds for the Fairbury-Ruskin line.

The motion to dismiss in the suit filed by the Interstate Commerce Commission will be granted. In the suit filed by the Nebraska Public Service Commission the motion to dismiss is reconsidered in light of the evidence and also will be granted.

Dated October 29, 1973.

BY THE COURT

/s/ Warren K. Urbom, Chief Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHT CIRCUIT

No. 73-1920

INTERSTATE COMMERCE COMMISSION,
Appellant,

vs.

CHICAGO, ROCK ISLAND, AND PACIFIC
RAILROAD COMPANY,
Appellee.

Appeal from the United States District Court for
the District of Nebraska

Submitted: May 14, 1974

Filed: July 24, 1974

Before GIBSON and WEBSTER, Circuit Judges, and
WILLIAMS, District Judge*.

GIBSON, Circuit Judge.

This litigation might be considered another chapter in the saga of the vanishing American railroads. Due to an abandonment of approximately 39 miles of track by the Chicago, Rock Island and Pacific Railroad Company (the Rock Island), the residents of Gladstone, Gilead, Hebron, Deshler and Ruskin, Nebraska, no longer have to "stop, look, and listen" before crossing the Rock Island's Ruskin line. More importantly in terms of the statutory scheme embodied in the Interstate Commerce Act,[1] shippers have been forced to turn to alternate methods

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* The Honorable Paul X Williams, United States District Judge for the Western District of Arkansas, sitting by designation.

1 49 U.S.C. § 1 et seq.

of transporting goods due to the abandonment of rail service. However, in this proceeding we are not called upon to determine the merits of the abandonment application pending before the Interstate Commerce Commission (ICC), but rather must determine where the proper means of redress lies for an unauthorized abandonment of lines subject to the jurisdiction of the ICC.

The Congressional scheme is set forth in 49 U.S.C. § 1. Section 1 (18) provides in pertinent part:

> [N]o carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, *unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.* (Emphasis supplied.)

Section 1 (20) further provides:

> The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it * * * and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. *From and after issuance of such certificate, and not before,* the carrier by railroad may * * * proceed with the * * * abandonment covered thereby. Any * * * abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section *may be enjoined by any court of competent jurisdiction* at the suit of * * * the Commission * * *. (Emphasis supplied.)

The ICC and the Nebraska Public Service Commission brought suits pursuant to 49 U.S.C. § 1 (20) for an injunction compelling the Rock Island to restore service on its Ruskin line. After a hearing on the consolidated

actions, the District Court refused to enjoin the abandonment; instead it ordered dismissal of the actions. The court felt that the ICC should exercise primary jurisdiction in the matter because its special expertise would allow it to resolve the issues of the effect of abandonment on the Rock Island, the probable cost of restoration of service, the financial ability of the Rock Island to bear the cost of restoration, and what effect the outlay of funds on the Ruskin line would have on service to shippers in other parts of the country—in short, those issues relative to the merits of the Rock Island's abandonment application. The ICC appeals the dismissal of its complaint, arguing that the doctrine of primary jurisdiction does not apply.[2] Before proceeding to the legal issues presented, a detailing of the relevant facts will be helpful in understanding the issues.

The controversy took form March 2, 1973, when the Rock Island issued an "embargo", a notice to patrons on the line that service would be terminated because of poor track conditions. An "embargo" issued by a common carrier is an emergency measure used when for some reason the carrier is unable to perform its duty as a common carrier. *Frochling Supply Co. v. United States*, 194 F. 2d 637, 641 (7th Cir. 1952). If justified, an embargo serves to relieve the carrier of its liability for failing to provide transportation. See 49 U. S. C. § 1 (4) (Duty to furnish transportation); 49 U. S. C. § 8 (Liability of carriers for damages).

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2 The Nebraska Public Service Commission did not appeal the dismissal of its suit by the District Court.

Suit by the Nebraska Public Service Commission was filed May 5, 1973, seeking to enjoin "abandonment"; the Rock Island's application for abandonment was filed with the ICC May 21, 1973; and the instant suit was filed August 22, 1973, and consolidated with the prior Public Service Commission action.

The threshold question for the District Court's determination was whether an abandonment had occurred. If the cessation of operations continued because of conditions over which the Rock Island had no control, no abandonment within the meaning of 49 U. S. C. § 1 (18) would be established. *Zirn v. Hanover Bank*, 215 F. 2d 63, 69 (2d Cir. 1954); *Myers v. Arkansas & O. Ry.*, 195 F. Supp. 36, 41 (W. D. Ark. 1960).

Abandonment, unlike an embargo, implies an intention to indefinitely or permanently cease all service. *Meyers v. Jay Street Connecting R.R.*, 259 F. 2d 532, 535 (2d Cir. 1958); *Wheeling & L. E. Ry. v. Pittsburg & W. V. Ry.*, 33 F. 2d 390, 392 (6th Cir. 1929). Factually, determination of the question revolves around the intent of the railroad; cessation of service for lack of physical equipment has been determined not to be an abandonment, *Zirn v. Hanover Bank*, *supra*, as has the impossibility of operation due to flood damage to tracks and railway bridges, *Myers v. Arkansas & O. Ry.*, *supra*.

Here there is no difficult question of fact as to whether an abandonment occurred. The District Court determined there was an abandonment in May or June, 1973, when weather conditions would have allowed track restoration. The Rock Island admitted on oral argument

that there was a "technical" abandonment in June, 1973. The Rock Island maintains that an unusual winter and spring, marked by abnormal precipitation and temperature fluctuation, caused the softening of the roadbed and deterioration of ties to the extent it was no longer safe to run a train on this line. This must be considered a matter of degree, as the fact that 50 derailments occurred on this line from February, 1971, through January, 1973, could have led to a conclusion that the line was no longer safe prior to March 2, 1973.

The Commission admits the impossibility of operation over the Ruskin line in March, 1973. However, it asserts that these weather conditions would not have necessitated abandonment of operations had the railroad not consciously withheld essential maintenance from the line over the preceding years. The record shows that the Rock Island had been looking for a way to abandon the line since at least October, 1970. Because is could foresee no success with an abandonment petition before the Commission, it considered itself to be in a dilemma. The Ruskin line has continually shown a profit. The Rock Island felt that cost of performing essential rehabilitation on the line would not be warranted by the revenue it produced. If the Rock Island did rehabilitate the line, it would be able to show an operating loss and thereby improve its chances of having abandonment approved. If it did not rehabilitate the line, it would continue to show a profit, thus decreasing the chances on its abandonment petition. Opting for the short run profit until the Rock Island's management determined the time was auspicious for approval of its planned abandonment applica-

tion, the matter continued to be much debated from October, 1970, to March, 1973, when the railroad was spared any further debate by the unusual weather conditions which finally put the track out of service.

The Commission's view that the track would not have become impassible in March, 1973, except for the Rock Island's failure to perform essential maintenance finds support in the record. Minutes of a November 27, 1970, Branch Line Committee meeting indicate that the Ruskin line was even then in "deplorable condition." A memo from W. C. Hoenig, General Manager of the Kansas City, Kansas, operating department to R. J. Lane, Senior Operating Assistant of the Rock Island, dated March 24, 1971, stated: "Almost every trip made on the Ruskin line involved one or more derailments, and we are rapidly reaching a point of cessation of service unless a general rehabilitation program is established." June 4, 1971, Mr. Lane wrote "the physical condition of the line is probably the worst on the system." He further acknowledged that there was no alternative but abandonment or rehabilitation of the line. However, Mr. Dixon, President of the Rock Island, determined prior to June 29, 1971, that abandonment should not be pursued, nor rehabilitation begun, but rather suggested spending "the minimum amount necessary to make the branch passable and keeping it in a minimal safe operating condition."

This apparently was a continuation of the Rock Island policy of many years. Mr. Lane wrote in February, 1973, that "one of the principal reasons it has shown a profit is the fact that we have, for years, performed an *absolute minimum* of maintenance on the line." (Emphasis

supplied.) However, taking Mr. Dixon's suggestion to heart, the Rock Island managed to further reduce maintenance expenditures on the Ruskin line from $84,828 in 1971 to $48,289 in 1972. And the testimony at the hearing revealed that at least 50% of the maintenance expenditures on the Ruskin line went not to improve the "deplorable condition" of the line but to fix the numerous derailments. With this factual background in mind we turn now to the legal issues presented for our review.

Although the District Court felt an unlawful abandonment had occurred, it determined that the suit should be dismissed so that the ICC could exercise primary jurisdiction in the matter. We think this determination was a clear error of law. The doctrine of primary jurisdiction has no application in this proceeding.

The challenge instituted is expressly authorized by the Interstate Commerce Act without mention of any prior resort to ICC administrative proceedings. The fact that suit may be maintained at the instance of the Commission is a strong indication that such matters are properly determined by the courts. Indeed, the Supreme Court has stated in regard to suits under § 1 (20):

> Upon presentation by the carrier of application for a certificate, the commission, for the purpose of determining whether it is authorized by the act to consider the merits, may pass incidentally upon the question whether the project is one covered by § 1 (18). *But the decision of that question is for the court in either a suit to set aside an order granting a certificate or* in a suit under § 1 (20) to enjoin a violation of *§ 1 (18).* * * * *That paragraph* [*§ 1 (20)*] *provides the only method for enforcing § 1 (18).*

Powell v. United States, 300 U. S. 276, 287 (1937). (Emphasis supplied.)

Secondly, absent the express provision of the statute requiring the district court to exercise its jurisdiction, the rationale of primary jurisdiction has no application to the facts of this case.[3] We have had occasion to recently consider the doctrine of primary jurisdiction. See *Izaak Walton League v. St. Clair*, No. 73-1407 (8th Cir., filed May 17, 1974). Therein we stated, quoting from *United States v. Western Pac. R. R.*, 352 U. S. 59, 63-64 (1956):

> "'Primary jurisdiction,' * * * applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial

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[3] According to Professor Davis, the doctrine of primary jurisdiction received its first formulation in **Texas & Pacific R. R. v. Abilene Cotton Oil Co.**, 204 U. S. 426 (1907). 3 K. Davis, **Administrative Law Treatise** § 19.02 (1958). There it was held the reasonableness of rates must first be determined by the Interstate Commerce Commission. The courts are not strangers to the doctrine of primary jurisdiction as it affects railway cases. See cases collected in **Great Northern Ry. v. Merchants Elev. Co.**, 259 U. S. 285, 295 n. 1 (1922). Mr. Justice Brandeis formulated the doctrine's application to ICC cases as follows:

> Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative in contradistinction to judicial. **But ordinarily the determining factor is not the character of the function, but the nature of the controverted question and the nature of the inquiry necessary for its solution.**

Great Northern Ry. v. Merchants Elev. Co., supra at 291. (Emphasis supplied.)

process is suspended pending referral of such issues to the administrative body for its views."

Here, there are no issues requiring the views of the administrative agency. The concerns expressed by the District Court to justify application of the doctrine of primary jurisdiction relate to merits of the pending abandonment application. An action under § 1 (20) to enjoin abandonment concerns the maintenance of the procedural integrity of the processes provided in the Interstate Commerce Act and is not an action in which the court may concern itself with the merits of the railroad's abandonment application.[4] The only question for resolution is whether there has been an abandonment within the intendment of § 1 (18). This is a legal question for the courts to determine. *Wheeling & L. E. Ry. v. Pittsburg & W. V. Ry., supra* at 393. *See also, Meyers v. Jay Street Connecting R. R., supra; Pennsylvania v. Penn Central Transportation Co.*, 348 F. Supp. 28 (M. D. Pa. 1972), *aff'd*, 475 F. 2d 1394 (3d Cir. 1973); *Asbury v. Chesapeake & O. Ry.*, 264 F. Supp. 437 (D. D. C. 1967); *Myers v. Arkansas & O. Ry., supra*, wherein the courts proceeded to determine the abandonment issue without resort to the Commission.

Here, without denoting it as a finding, the District Court stated, "I am inclined to the view that there has been an unlawful abandonment." We emphasize that the question before the District Court does not concern the merits of the abandonment application—this is a matter

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4 This is not to say that those factors which enter into a decision on the merits of an abandonment application may not be considered by the district court in deciding whether an injunction should issue.

for the ICC—but merely the narrow issue of whether an abandonment has occurred. Once this question is resolved with a finding of abandonment, the District Court then must proceed to determine whether an injunction should issue. The record before us admits of no finding but that an illegal abandonment has occurred; whether it be May or June, 1973,[5] is immaterial for the purposes of this case. We therefore must reverse the decision of the District Court dismissing the complaint on grounds of primary jurisdiction.

We will not on this appeal direct entry of an injunction compelling the Rock Island to restore service. This is a matter which should first be determined by the District Court, taking into consideration the factual circumstances of the case and the strong Congressional policy and substantial public interest in not permitting abandonment of railroad service without approval of the ICC as required by § 1 (18) of the Interstate Commerce Act. As the complaint was dismissed due to application of the primary jurisdiction doctrine, the court made no more findings of fact than absolutely necessary so as not to interfere in any manner with the ICC proceedings. We think the District Court should have the opportunity to make factual findings and determine in the first instance whether an injunction should issue.

Section 1 (20) states that an illegal abandonment "*may* be enjoined by any court of competent jurisdiction."

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5 The Rock Island admitted to a "technical" abandonment of the line in June, 1973, when it says conditions would have permitted restoration of the line to service. The District Court viewed abandonment as occurring in May or June, 1973.

(Our emphasis.) This language implies the existence of discretion in determining whether an illegal abandonment should be enjoined. Ordinarily a reviewing court applies the principle that the grant or denial of an injunction will be reviewed only to determine whether there has been an abuse of discretion. *Yakus v. United States*, 321 U. S. 414, 440 (1944); *Minnesota Public Interest Research Group v. Butz*, No. 73-1242 (8th Cir., filed June 10, 1974) (*en banc*); *E. W. Bliss Co. v. Struthers-Dunn, Inc.*, 408 F. 2d 1108, 1113 (8th Cir. 1969); 7 Moore's Federal Practice ¶ 65.04 [2] (2d ed. 1974). The same standard would appear applicable in the present case. We note the Supreme Court decisions in *Thompson v. Texas Mexican Ry.*, 328 U. S. 134 (1946) and *Texas & P. Ry. v. Gulf, C. & S. F. Ry.*, 270 U. S. 266 (1926) contain language which arguably denies discretion to withhold an injunction once a violation of § 1 (18) is found.

In *Thompson*, a trackage agreement which allowed one railroad to operate over the tracks of another expired. The Supreme Court held that operations over the track must continue until abandonment is authorized, even though there was no longer a contract right to do so. In *Texas & P. Ry.* the railroad attempted an extension of its tracks without authorization from the ICC, also a violation of § 1 (18). In discussing a court's role upon application for injunction under § 1 (20) the Court stated:

> The function of the Court upon the application for an injunction is to construe the statutory provision and apply the provision as construed to the facts. The prohibition of paragraph 18 is absolute. If the proposed track is an extension ad no certificate has

been obtained, the party in interest opposing construction is entitled as of right to an injunction.

Texas & P. Ry. v. Gulf, C. & S. F. Ry., supra at 273.

In neither of these cases was the question of a physical impossibility of operation presented. In cases where a court has been confronted with a physical impossibility of operation without substantial expenditures for repair, the determination as to whether to issue an injunction has been viewed as one of equity, whether it would be equitable to require substantial expenditures when shortly thereafter the Commission may approve the railroad's abandonment application.

Thus, in *Pennsylvania v. Penn Central Transportation Co., supra*, an injunction was denied which would have required restoration of service on two branch lines badly damaged by Tropical Storm Agnes at a cost found by the District Court to be approximately $650,000. In *Asbury v. Chesapeake & O. Ry., supra*, an injunction was denied where the abandonment proceeding before the Commission was in its last stages, and restoration of service would have entailed repair of a tunnel at substantial cost. There is nothing in the reported decision indicating what necessitated the tunnel repair in *Asbury*. And in *Myers v. Arkansas & O. Ry., supra*, the court held there was no abandonment as to the cessation of service was involuntary, being caused by severe rains and flooding which damaged the tracks and certain bridges lying within an area of property the United States had condemned and where the railway had no right to enter and make repairs.

The Commission argues that the above cases indicate only that the termination of service for reasons beyond the railroad's control[6] may justify the exercise of discretion in refusing an injunction, but that no case has allowed "abandonment by neglect," *i. e.*, permitting a railway by a deliberate neglect of essential maintenance which allows tracks to deteriorate to a "deplorable condition" to then successfully argue that restoration of service would be inequitably expensive. In such a case it is argued that the equities of the situation significantly favor the shippers on the line and require the issuance of an injunction. We would agree that this practice, if found by the District Court, would be a factor militating against the Rock Island's argument of conditions beyond its control necessitating termination of service.

The Commission further argues that the weak financial basis of the railroad does not afford a sufficient basis for denial of an injunction, citing *Meyers v. Jay Street Connecting R. R., supra*. In *Meyers* a preliminary injunction requiring the continuance of service was affirmed despite the fact the railroad had lost money for five years, had current liquid assets of only approximately $400, and in view of the undisputed fact of increasing larger monthly losses. The court noted that relief for the railroad lay in an application for reorganization under the Bankruptcy Act and stated:

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6 Noting that in **Asbury** there was no indication of the reason for the necessity of tunnel repair.

> Unless they do so, and relief is denied to them, it is our opinion that the hardships imposed by the injunction do not outweigh the strong purpose of the Interstate Commerce Act to prohibit the abandonment of railway service without the approval of the ICC.

Meyers v. Jay Street Connecting R. R., supra at 536.

Obviously the Rock Island must present a compelling financial case in light of the persistent profit shown by the Ruskin line, the railroad's own projections of increasing grain production in the area which would increase car traffic, and the statutory prohibition against unauthorized abandonment.

There is one related aspect of this case we find particularly disturbing. Service on this line was terminated March 2, 1973. An abandonment application was filed May 21, 1973. At oral argument we were informed the matter had not yet been docketed for a hearing and no estimate of when a final Commission decision will be rendered is available. One of the factors affecting the balancing of equities in *Penn Central Transportation Co., Asbury,* and *Myers,* was the fact that the abandonment proceedings before the Commission were expected to be resolved within a reasonable period of time, and thus while cessation of service was no doubt a burden on shippers during the interim, abandonment would either soon be authorized or denied. Where a Commission decision might soon be forthcoming authorizing abandonment, courts were justifiably reluctant to compel expenditures which in a few months could be seen to be wasteful or senseless. Here neither shippers nor this court can see any prospect of resolution of the abandonment issue within the near future.

The effects of this inordinate delay are felt most directly by shippers who no longer can move their goods by rail, for most shippers the cheapest method of transportation. The increased cost of transportation will of course increase the cost of the goods and thereby indirectly affect consumers. Moreover, businesses left without rail transportation may be forced to close or relocate, directly affecting the economies of the cities and towns along the abandoned line.

The effect on the railroad may not be entirely beneficial either. In the short run they are spared the expense of maintaining the line. But until abandonment is authorized they are liable for damages resulting from breach of their duty to provide transportation, 49 U. S. C. § 1 (4); *Johnson v. Chicago, M. & St. P. R. R.*, 400 F. 2d 968, 971-72 (9th Cir. 1968), and should abandonment not be authorized, the cost of restoration a few years hence may safely, though regrettably, be assumed to be substantially higher than at present.

Finally, no doubt shippers and citizens of towns to be affected upon approval of an abandonment application receive the impression of a dereliction of duty on the part of the ICC when final resolution may be years in the future. It is frustrating and thoroughly regrettable that the ICC could not in a matter of weeks determine whether or not this branch line should be abandoned, saving litigation expenses and more importantly giving a definitive answer to the future of the road. But no, our legal system is now so complex, so overburdened with contradictory requirements, that the system has almost ground to a halt

The reason underlying this unreasonable delay is Congressional pyramiding of additional requirements on a system already enmeshed in bureaucratic delay. This disturbing situation is exacerbated by the application of the National Environmental Policy Act (NEPA), 42 U. S. C. § 4321, *et seq.*, to railroad abandonment applications. See *Harlem Valley Transportation Ass'n v. Stafford*, 360 F. Supp. 1057 (S. D. N. Y. 1973), *aff'd* No. 73-2496 (2d Cir., filed June 18, 1974); *City of New York v. United States*, 337 F. Supp. 150, 158-60 (E. D. N. Y. 1972).

The decision of the district court in *Harlem Valley* requires the ICC to determine whether a particular abandonment is a "major Federal action significantly affecting the quality of the human environment" and if so, to prepare an impact statement for circulation to parties and use in the agency process. We were informed on oral argument that the ICC is presently attempting to assemble a staff, and based on the appellate decision in *Harlem Valley* (now decided against the ICC), would shortly begin work on the accumulated abandonment petitions, some 320 as of January, 1974. How long this process may take before this particular application reaches the hearing stage is unknown, but we can rest assured it will be considerable.

Such a delay in the determination of an abandonment application significantly affects the traditional balancing of equities upon application for injunction. The

efficacy of the procedural process is called into question any time a railroad abandons a line without ICC approval in light of the clear statutory direction that service be maintained. However, as the district courts in *Penn Central Transportation Co., Asbury,* and *Arkansas & O. Ry.,* determined, there are situations in which it would be inequitable to require restoration of service on a line where, caused through no fault of the railroad, the costs of restoration would be substantial, and the ICC could be expected to shortly determine whether abandonment would be authorized. We do not intend to intimate a feeling on the merits of an injunction in this particular case but merely are attempting to demonstrate the effects that the delay in agency processes caused by application of NEPA may have upon the discharge of that agency's statutory responsibilities in its field of expertise.[7] This is a matter which the courts, bound to apply the statutory mandates of both NEPA and the Interstate Commerce Act, cannot satisfactorily resolve. In view of the importance of rail transportation to the overall transportation needs of this country, we can only express a hope that Congress will recognize the difficulties created and attempt a satisfactory resolution.

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7 Not an inconsequential part of the delay in the ICC processes lies not so much in the application of NEPA to abandonment applications but in the ICC's refusal to recognize that the NEPA requirements do apply. See **Harlem Valley Transportation Ass'n v. Stafford,** No. 73-2496 (2d Cir., filed June 18, 1974) (slip opinion at 4278-81).

Our reversal of the District Court's application of primary jurisdiction in this case compels a remand to the District Court to determine whether the injunction sought by the ICC should continue. We feel the District Court should have the initial opportunity to resolve the contested issues of fact in this record.

The judgment of the District Court dismissing the complaint is reversed and the cause remanded for further proceedings consistent with this opinion. We further express the hope that the ICC will undertake to give this abandonment proceeding speedy consideration consistent with the fulfillment of its statutory responsibilities.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

JUDGMENT
UNITED STATES COURT OF APPEALS

For The Eighth Circuit

CV73-L-244

No. 73-1920. September Term, 1973

INTERSTATE COMMERCE COMMISSION,
Appellant.

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY and WILLIAM J. DIXON,
Appellees.

(Filed September 9, 1974)

Appeal from the United States District Court for the District of Nebraska.

This cause came on to be heard on the record from the United States District Court for the District of Nebraska and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed.

And it is further ordered by this Court that this cause, be, and it is hereby, remanded to the said District Court for further proceedings consistent with the opinion of this Court.

Costs taxed in favor of Appellant:	July 24, 1974
Costs of reproducing five copies of Appendix:	$ 47.50
Costs of printing ten copies of Appellant's brief:	$ 75.50
Total costs of Appellant for recovery from Appellees in the U. S. District Court:	$123.00

A True Copy.

Attest:

Clerk, U. S. Court of Appeals, 8th Circuit.

September 6, 1974

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Case No. 73-1920

INTERSTATE COMMERCE COMMISSION,
Appellant.

vs.

CHICAGO, ROCK ISLAND AND
PACIFIC RAILROAD CO.,
Appellee.

PETITION FOR REHEARING

COMES NOW the appellee Chicago, Rock Island and Pacific Railroad Co. and respectfully petitions the Court for a rehearing in the above-captioned cause for the following reasons:

1. *In determining that the District Court erred in dismissing the action on the basis of the doctrine of primary jurisdiction, this Court placed an unduly narrow*

and restrictive interpretation on the doctrine and reached a result which is inconsistent with its underlying principles.

In reversing the decision of the District Court which dismissed this action on grounds of primary jurisdiction, the court on page 8 of its opinion cited with approval the following statement of the parameters of the doctrine of primary jurisdiction:

> "'Primary jurisdiction,' * * * applies where a claim is originally cognizable in the courts, and comes into play *whenever enforcement of the claim* requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." *Izaak Walton League v. St. Clair*, No. 73-1407 (8th Cir., filed May 17, 1974), quoting from *U. S. v. Western Pacific RR.*, 352 U. S. 59, 63-64 (1956) (emphasis added).

This Court went on to conclude that the "only question for resolution" by the District Court was "whether there had been an abandonment within the intendment of § 1 (18)." (Opinion, 9.) The Court determined that the record "admits of no finding but that an illegal abandonment had occurred," and thus remanded to the District Court for findings of fact and a determination of whether an injunction should issue pursuant to 49 U. S. C. A. § 1 (20). In its opinion, the Court further notes that while it is not within the province of the District Court to rule on the merits of the pending abandonment application, the Court may well consider factors relating to the merits of the application in making its discretionary determination of whether an injunction should issue. (Opinion p. 9, n. 4.)

Thus, under the current status of this case, the District Court on remand would be required to make two determinations: (1) whether there was an abandonment in violation of 49 U. S. C. § 1 (18); and if so, (2) whether such abandonment should be enjoined under 49 U. S. C. § 1 (20). Assuming *arguendo* that the District Court were to make an affirmative determination on the first question, it would then be required to consider, resolve, and make findings of fact relating to issues which this Court acknowledges will enter into the decision of the Interstate Commerce Commission on the merits of the abandonment application. These factual issues include the effect of cessation of service on shippers and on the railroad, the actual condition of the branch line and probable cost of restoration, the financial ability of the railroad to bear such costs, and the effect on shippers on other lines within the system if the railroad is ordered to make such expenditures.

Thus, the net result: The "enforcement of the claim," i.e., the determination of whether or not an injunction should issue, requires "resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." The appellee respectfully contends this conclusion is inescapable, and places the particular facts of the instant case squarely within the purview of the doctrine of primary jurisdiction, as articulated in *United States v. Western Pacific RR., supra.* The underlying purpose of the doctrine is to establish a priority of action where the jurisdictions of courts and administrative agencies overlap with respect to certain types of factual issues. The requirement imposed

by this Court's opinion that the District Court proceed to make findings of fact with respect to certain issues which will also be adjudicated by the I.C.C. in proceedings on the abandonment application, thereby creating the possibility of inconsistent or contradictory findings by court and commission, undermines the doctrine's underlying premise and is conducive to the very sort of inter-tribunal conflict that the doctrine is designed to prevent.

Finally, the appellee wishes to point out that while there are decisions wherein courts have proceeded to grant or deny an injunction pursuant to § 1 (20) without prior resort to the I.C.C., as cited by the Court at page 9 of its Opinion, none of these cases specifically preclude application of the doctrine of primary jurisdiction in an appropriate factual situation. The appellee respectfully contends that where, as in the instant case, the factual issues which the Court must resolve in deciding whether to grant or deny an injunction are the same issues that will be decided by the I.C.C. in adjudicating a pending abandonment application, the interests of justice and the procedural integrity of the Interstate Commerce Act are best served by staying the judicial proceedings until the administrative proceeding has run its course.

The appellee also respectfully contends that the interests of justice and the protection of the procedural integrity of the I.C.C. dictate that the primary jurisdiction of the Agency be involved to decide the threshhold question of "Voluntariness."

2. *The 1973 amendment to* 49 U.S.C. § 1 (16) *and its interpretation by the Interstate Commerce Commission provides an additional reason why judicial proceedings in*

the District Court should be suspended pending hearing of the abandonment application.

Title VI of the Regional Rail Reorganization Act of 1973, § 601 (e), a copy of which is attached hereto as Exhibit 1, amends § 1 (16), of the Interstate Commerce Act, 49 U.S.C. § 1 (16) by providing a procedure whereby the I.C.C. may by its own motion, order another carrier to provide temporary rail service on a line where there has been a cessation of such service, because: (1) the owner of the affected line has a cash position which makes continuing operation impossible; or (2) the owner has been ordered to discontinue service by a court; or (3) the owner has abandoned service without obtaining a certificate from the I.C.C. The scope of this amendment has been unclear. Until July 11, 1974, well after briefs were submitted and arguments completed in this matter, it was generally concluded that the amendment was directed toward the areas in the Northeast and Midwest where seven bankrupt railroads are operating. This conclusion was fostered by Senate Report No. 93-601 concerning the Regional Rail Reorganization Act of 1973 (1973 U. S. Code Cong. and Adm. News 3292) states:

> "The purpose of subsection (e) is to assure the continuance of essential rail service in the Northeast and Midwest region in case one or more of the seven railroads presently in reorganization under section 77 of the Bankruptcy Act ceases operations prior to the adoption, approval, and implementation of the final system plan. By authorizing the Commission to direct a carrier to operate over the line of a nonoperating carrier for an interim period, transportation chaos and economic disaster can be avoided while the planning and implementation process provided for in

> the bill moves forward in a careful and orderly manner."

However, on July 11, 1974, the Interstate Commerce Commission in Ex Parte No. 293 (SUB-NO. 3), a copy of which is attached hereto as Exhibit 2, appears to have taken the position that the legislation applies to all Class I and Class II railroads in the United States, thus including the appellee. Since the I.C.C.'s interpretation and order was not issued until that date, the impact of this particular legislation was not previously briefed or argued in this action.

The appellee respectfully submits that the aforementioned amendment to § 1 (16) of the Interstate Commerce Act has particular significance in this action. The record contains undisputed evidence that at the time when weather conditions would have permitted restorative work on the Ruskin line to commence, the appellee's cash position was such that it simply could not afford the enormous expenditure such restoration would have required (Testimony of C. James Taylor, Transcript pp. 547-549). In situations such as this, the amendment gives the I.C.C. the power to direct another carrier to provide service on the line, at least temporarily, with operating losses to be reimbursed from the federal treasury. Ex Parte No. 293, Appendix A, provides that capital expenditures on the affected line and expenditures for deferred maintenance made by the directed carrier may also be reimbursed if made with prior approval of the I.C.C.

Thus, Congress has now created a middle ground between cessation of operations by a financially distressed railroad, leaving affected shippers without service, and court-ordered restoration of service which would have the

likely effect of plunging the distressed railroad into an even deeper financial abyss. By directing another carrier to provide temporary service on the affected line, the I. C. C. can provide short term relief to shippers as well as to the distressed carrier. The procedure has obvious long term benefits as well, since by approving capital improvement and deferred maintenance expenditures to be compensated by the federal treasury, the I. C. C. can initiate a program of up-grading of the line without financial hardship to the carrier, thereby increasing the possibility that at some future date the carrier can restore service on a permanent basis.

The new power conferred upon the I. C. C. by this legislation is an additional reason why the District Court should refrain from issuing or denying an injunction until after the I. C. C. has had an opportunity to review the matter in the course of the proceedings on the abandonment application and possibly, in its discretion invoke the procedures established by the new legislation to provide temporary service on the Ruskin line through a directed carrier. An injunction issued by the District Court requiring the appellee to begin restoration of the Ruskin line at this point would virtually preclude the Commission from exercising this option, and would of itself be a threat to the procedural integrity of the Interstate Commerce Act.

Moreover, the new legislation may well cast an entirely different light on the threshhold question of whether there has been an "unlawful abandonment" in the instant case. While not entirely clear in its rationale, the opinion in *Meyers v. Jay Street Connecting Railroad*, 259 F. 2d

532 (2d Cir. 1958) has been cited for the proposition that the financial inability of a carrier to provide service on a line does not make cessation of service involuntary, and therefore not an "unlawful abandonment" in the sense of involuntary cessation of service due to *force majeure*. An analysis of the parties to the action and the language of the Court in regard to the parties other than the carrier, does not lead one to the conclusion that *Meyers v. Jay Street Connecting Railroad, supra*, stands for the stated proposition. The effect of such a holding is obviously harsh, in light of the financial difficulties facing many modern railroads and the practical problems of attempting to force a railroad to spend money it does not have to restore service on a line. Thus, in enacting the amendment to § 1 (16) by providing an avenue of relief for shippers affected by such cessations of service apart from the § 1 (20) injunction procedure, Congress has acted to counter the harsh result of the *Jay Street* decision in a manner that will protect the interests of shippers and distressed carriers alike. The amendatory language clearly distinguishes between cessation of service because of a cash position which makes operation impossible and abandonment within the meaning of the Act. The amended language says:

> (b) Whenever any carrier by railroad is unable to transport the traffic offered it because—(1) its cash position makes its continuing operation impossible; (2) * * *; or (3) it has abandoned service without obtaining a certificate from the Commission pursuant to this section; (Sect. 1 (16) (b) (1) (2) & (3)).

Unless impossibility of operation caused by a carrier's cash position falls short of an abandonment within the

meaning of sections 1 (18) (19) & (20) of the Act, the language of subsection (b) (1) is superfluous or at best redundant and repetitive. Obviously an involuntary cessation of service caused by a deficient cash position does not constitute, in the minds of Congress, an "unlawful" abandonment.

Given this alteration in the regulatory scheme created by the Interstate Commerce Act, the appellee respectfully requests this Court on rehearing to reconsider its observation that the record "admits of no finding but that an illegal abandonment has occurred."

The appellee further respectfully suggests that discerning a cash position contemplated by subsection 1 (16) (b) (1) of the Act is specifically a responsibility of the I.C.C. and thus fully within a "regulatory scheme" envisioned by the primary jurisdiction doctrine.

WHEREFORE, the appellee petitions the Court for rehearing and reconsideration of its judgment entered July 24, 1974, and further requests the Court to affirm the judgment of the District Court.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD CO.,
Appellee

By KNUDSEN, BERKHEIMER, ENDACOTT & BEAM
714 Stuart Building
Lincoln, Nebraska 68508
475-7011

APPENDIX E

NOTICE OF PROPOSED RULEMAKING AND ORDER
TITLE 49—TRANSPORTATION

CHAPTER 10—INTERSTATE COMMERCE COMMISSION

SUBCHAPTER B—PRACTICE AND PROCEDURE
PART 1100—GENERAL RULES OF PRACTICE
EX PARTE NO. 293 (SUB-NO. 3)

IMPLEMENTATION OF PUBLIC LAW 93-236, SECTION 601 (e), REGIONAL RAIL REORGANIZATION ACT OF 1973—SUBMISSION OF COST DATA TO JUSTIFY REIMBURSEMENT

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 28th day of June, 1974.

Pursuant to section 601 (e) of the Regional Rail Reorganization Act of 1973, notice is hereby given that the Commission proposes to establish a general form and procedures whereby railroads directed to perform emergency service over the lines of another railroad under that section may submit to the Commission a record of the cost incurred in such performance, the direct revenues derived therefrom, and other pertinent information from which the Commission may certify to the Secretary of the Treasury the amounts, if any, to be paid to the directed carrier.

Section 601 (e) is an amendment to section 1 (16) of the Interstate Commerce Act which authorizes the Commission to respond to cessations of service by a carrier by railroad, by directing another railroad to temporarily provide for the handling, routing, and movement of traffic over the lines of the carrier no longer able to perform that

service. This provision specifies three circumstances under which the cessation of service must occur in order to justify a direction by the Commission, the general method by which such directed service shall be performed, and the criteria which must be satisfied as to the directed railroad before it may be ordered to temporarily conduct the discontinued operations.

Section 601 (e) also requires that a directed carrier be reimbursed by the Federal Government in the amount by which the cost, as defined in subparagraph (E), of handling, routing, and moving the traffic of the other carrier over that carrier's lines of railroad exceeds the direct revenues therefrom. To expedite and standardize the reimbursement procedure, Congress has required the Commission to prescribe a form by which a directed carrier shall currently record the cost of the directed operation, which form shall be submitted by the directed carrier to the Commission at the time or times specified in the order directing the performance of the operation. The Commission shall, in turn, audit the cost form submitted and certify to the Secretary of the Treasury the amount of the payment required to be made to the directed carrier, which payment shall be made from funds authorized to be appropriated under section 601 (e).

The Commission herein proposes the form by which the cost of an operation directed under section 601 (e) may be recorded and submitted to the Commission, as set forth in the Appendix hereto.

Respondents and participants in this rulemaking proceeding are invited to submit statements on any and all aspects of the attached form and explanatory material, in

addition to any other factors they deem relevant to this proceeding:

It is ordered, That a proceeding be, and it is hereby, instituted under the authority of section 601 (e) of the Regional Rail Reorganization Act (45 U. S. C. 701 et seq.), the Interstate Commerce Act (49 U. S. C. 1 et seq.), including more specifically section 1 (16), and the Administrative Procedure Act (5 U. S. C. 553 and 559) to determine whether the general form for recordation and submission to the Commission of the cost incurred in or attributable to performance of operations directed by the Commission, as set forth in the Appendix to this notice, shall be adopted and for the purpose of taking such other and further action as the facts and circumstances may justify and require.

It is further ordered, That all Class I and Class II railroads subject to the Interstate Commerce Act be, and they are hereby, made respondents to this proceeding.

It is further ordered, That the United States Railway Association, the Federal Railroad Administration of the United States Department of Transportation, the Secretary of the United States Department of Treasury, and the Governors and the Public Utilities Commissions of the various states be given notice of the institution of this proceeding.

It is further ordered, That no hearing be scheduled for the receiving of oral testimony in this proceeding unless a need therefor should later appear but that respondents or any other persons interested in making representations in favor of or against the proposed form or in recommending revisions in that form are hereby invited to do

so by the submission of written data, views, and arguments.

It is further ordered, That any person intending to participate in this proceeding shall file an original and 15 copies of such data, views or arguments with the Secretary, Interstate Commerce Commission, Washington, D. C. 20423, on or before 30 days from the date of service of the order herein; and that all such statements will be a part of the record in the proceeding.

It is further ordered, That written materials or comments submitted will be available for public inspection at the offices of the Interstate Commerce Commission, 12th and Constitution Avenue, N. W., Washington, D. C., during regular business hours; and

It is further ordered, That statutory notice of the institution of this proceeding be given to the general public by mailing a copy of this order to the Governor of each State and to the Public Utilities Commissions or Boards of each State having jurisdiction over transportation, by depositing a copy of this order in the Office of the Secretary, Interstate Commerce Commission, Washington, D. C. for public inspection, and by delivering a copy thereof to the Director, Division of the Federal Register, for publication in the Federal Register as notice to all interested persons.

By the Commission.

ROBERT L. OSWALD,

Secretary.

(SEAL)

NOTE: This proceeding is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

Appendix A

Introductory Statements

The directed carrier must maintain detailed separations in its accounting records to identify the revenues and costs attributable to the movement of traffic and related activities in compliance with any Commission order issued under section 601 (e) of the Regional Rail Reorganization Act of 1973 (section 1 (16) (b) of the Interstate Commerce Act). Requests for payments must be supported by the information documented in this appendix. Records of all common expenses and overhead allocations, and all figures used to support these allocations, are required to be maintained in a separate file for review by the Commission.

Except as essential to safety and with prior approval of the Commission, expenditures shall not be made for deferred maintenance and shall not be considered as a cost of the directed operation. Capital expenditures, to be recognized as a cost, shall also require prior Commission authorization.

The compensable cost of a directed operation shall not include amounts for wages or salaries owed to personnel of the other carrier as a result of obligations incurred or for services rendered prior to the directed operation. It is anticipated that state, regional, and local subsidies normally paid for a service prior to the commencement of a directed operation of that service, shall be continued without diminution if the state, regional or local govern-

ment expects the service to be continued by a Commission directive; and, therefore, costs of a directed operation shall not include amounts by which such subsidies have been curtailed or eliminated during the directed operation.

Included as a compensable cost of the directed operation shall be a provision for interest on the amount by which revenues fall short of the directed carrier's cost in conducting the directed operation or on funds actually and necessarily borrowed to conduct such operations. The amount of interest recognized as a cost shall be determined by the average prime rate at New York City during the period of the directed operation and shall be paid on the amount by which the total expenses of the directed operation exceed the gross revenues.

Expenditures made for clearing wrecks and derailments, for injuries to and deaths of persons, and for damage to or destruction of property, including property in transit, caused by or incurred in connection with the directed operations, including cost of investigations and legal expenses, shall be a compensable cost and shall be specified in an expense account. If the actual amounts of damages or necessary expenditures have not been finally determined on the date of submission of this cost form, a reasonable reserve shall be established, with the supporting figures included, in the cost form to the Commission. If the directed carrier obtains insurance to cover such con-

tingencies, the cost of the insurance and expenditures within the limits of the insurance "deductible" shall be included as compensable items of cost.

Wages, salaries, and payments for benefits shall be separately recorded in the appropriate accounts of the cost form. Included as a compensable cost of the directed operation shall be all expenditures made by the directed carrier to or for the benefit of (1) employees of the carrier no longer able to perform the directed service who had previously performed such directed service, (2) any supervisory personnel or officials of the other carrier whose employment is shown to be essential to performance of the directed operation, and (3)any employees, supervisory personnel, or officials of the directed carrier whose employment is shown to be essential to performance of the directed operation. The term "employees" as used herein shall be defined as in the Railway Labor Act (45 U. S. C. 151) and in reference to orders of this Commission now in effect. The terms "supervisory personnel or officials" shall include all those persons in the service of a carrier who performs supervisory or management functions and who are not included in the term "employees" as used herein.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV73-L-244

INTERSTATE COMMERCE COMMISSION,
Plaintiff,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, and WILLIAM J. DIXON,
Defendants.

MEMORANDUM

(Filed October 31, 1974)

Following reversal by the United States Court of Appeals of this court's decision to dismiss the suit upon the basis of the doctrine of primary jurisdiction, I have reviewed all the evidence and now make findings of fact, acknowledging a lack of the expertise which I had hoped the Interstate Commerce Commission would exercise.

Cessation of service on the 39.9-mile-long Fairbury-Ruskin branch line began on March 2, 1973. The triggering cause was an unusually wet and variable winter, during which alternating freezing and thawing caused railroad beds to soften and ties and rails to become displaced. By March 2, 1973, the track was unsafe for use. On about May 18, 1973, the railroad company filed with the Interstate Commerce Commission an application for a certificate of public convenience and necessity permitting abandonment of the Ruskin branch line. That application is pending and there presently is no reason to think that a decision will be made within the predictable future. By late May or early June, 1973, weather conditions permitted

restoration of the track, but the railroad company did nothing to repair it and, as of then, without approval of the Interstate Commerce Commission, abandoned the branch line with intent not to return it to use unless ordered to do so.

Cost of restoring the Ruskin branch line to Federal Railroad Administration Class 1 status with maximum allowable speed of 10 miles per hour and a 190,000-pound gross weight limit at the time of the trial in late 1973 was between $550,000 and $600,000. The cost is undoubtedly greater today because of inflation.

Only a small fraction of the cost of restoration directly arose from the peculiarities of the 1972-1973 winter. Most of the cost was necessitated by the railroad company's long-lived policy of deferring maintenance on the Ruskin branch line. By November, 1970, the line was in "deplorable condition" and derailments were commonplace.

By late 1970 abandonment was viewed by the railroad company as desirable, but the company vacillated from then until February, 1973, on whether to file with the Interstate Commerce Commission an application for permission to abandon the line, inasmuch as it believed that the Interstate Commerce Commission was not likely to approve the application as long as the line was profitable. The line was profitable because of the low expenditure for maintenance. Direct maintenance expenses, such as roadway maintenance, bridges, ties, rails, ballast, other track materials, and track laying and surfacing, decreased in 1972 to about $37,000 from about $71,000 in 1971, and the maintenance gang man hours moved from 8,491 in 1970 to

12,171 in 1971 to 6,256 in 1972. Maintenance crews spent approximately 60 per cent of their time in the couple of years before the 1973 trial fixing up derailments.

Business was fairly good on the Ruskin line. While it permitted the showing of a profit because maintenance was kept low, it is not necessarily true that the line would have shown a loss if adequate maintenance expenditure had been made over the years. The evidence in that respect is limited, but the following is a fair analysis of what evidence was presented:

1. Business volume was gradually increasing and would have increased in 1973 and 1974 if use of the branch line had been resumed after the 1973 embargo.[1]
2. The branch operation regularly showed a profit.

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1 The most reliable evidence on the number of cars handled and the revenue realized from them and the only evidence of the profits is as follows:

	Cars	Revenue	Profit
1965	620	$140,415	not shown
1966	937	229,765	not shown
1967	887	249,093	not shown
1968	579	183,991	not shown
1969	642	222,904	not shown
1970	996	369,436	at least $100,000
1971	783	329,896	4,813
1972	876		54,819

3. The railroad company spent less on maintenance than it reasonably could have while retaining some profit.[2]

4. The railroad company in its systemwide operation has not made a profit since 1964 and showed a deficit of $5,502,501 in 1972.

There is no doubt that an abandonment has occurred without receipt by the railroad company of approval by the Interstate Commerce Commission. Abandonment has resulted and will result, unless enjoined, in substantial and irreparable harm to the shippers who have relied upon the Ruskin line. The judgmental question is whether it would be equitable to enjoin the railroad's perpetuating the abandonment while awaiting a decision of the Interstate Commerce Commission on the application for abandonment.

I conclude that the abandonment should be enjoined.

Failure to restore service on the Ruskin line after the embargo was not for reasons entirely beyond the railroad company's control. The amount of money needed to restore service after the embargo was occasioned more by the railroad company's failure adequately to maintain the

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2 In 1972, when profit was $54,819, expenditure for maintenance of way and structures was $48,289; in 1971, when the profit was $4,813, expenditure for maintenance of way and structures was $84,828. (Plaintiff's exhibit 8 N) The exact figures for 1970, when profit was in excess of $100,000, are not in evidence, but expenditure for maintenance of way and structures was nearer the 1972 figure of $48,289 than the 1971 figure of $84,828. (Testimony of Richard J. Lane, p. 336) The 12-hour law, which went into effect in December, 1972, would result in some additional expenditure, but the railroad company has not shown that the increase would have been there even if proper maintenance had been practiced during the past several years. That factual question then must be resolved against the railroad company.

facilities prior to that time than to the weather conditions of the winter of 1972-1973 and the spring of 1973. The company for at least two and a half years before the embargo genuinely considered itself in a dilemma. It doubted its ability to get Interstate Commerce Commission approval of an abandonment as long as the branch line showed a profit but hesitated to spend money on maintenance in order to show a loss by which chances for abandonment approval would be enhanced. It further felt that there were more profitable places for investing available money than on the Ruskin line.[3]

While the dilemma was genuine, it cannot serve as a justification for failure to seek advance approval of abandonment. Conditions for winning approval were not radically better after than before the spring of 1973. The railroad company considered long before the spring of 1973 that abandonment eventually would become necessary unless substantial outlays for restoration were made. If it had applied for abandonment, the issue probably could have been resolved by now. If abandonment had been approved by the Interstate Commerce Commission, large expenditures for restoration would have been rendered unnecessary; if abandonment had been denied by the Interstate Commerce Commission, the expenditures would have come about only after full exploration of the varying interests of the public and the railroad company by the Interstate Commerce Commission. It is the dalliance of

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3 Plaintiff's exhibit 2.

the railroad company which is a major factor in a large expenditure's being necessary without prior full assessment by the Interstate Commerce Commission. It is true that another factor is the exorbitant delay by the Interstate Commerce Commission between the filing the application for abandonment and a decision on the application by the Interstate Commerce Commission. The application was filed in May, 1973; the latest information received from Interstate Commerce Commission counsel on October 30, 1974, is that no environmental impact statement yet has been completed referable to this case and that from six months to a year probably will yet elapse before a final abandonment decision will have been made.

The thought mirrored in my earlier memorandum that an injunction should not be issued was impelled primarily by the confidence that a decision by the Interstate Commerce Commission would be relatively prompt and that an outlay of a large sum of money in the interim would be unfair. That confidence was not well placed. While it may seem ironic that delay by the Interstate Commerce Commission would work to the disadvantage of the railroad company, it does so, because this is not a dispute merely between the Interstate Commerce Commission and the railroad company. The shippers have a heavy stake in the outcome and none of the problems attending this proceeding can be attributed to them.

On balance, the equities press for an injunction against the railroad company's abandoning the service on the Ruskin line. A preliminary injunction, therefore, should be issued.

Counsel for the plaintiff will submit a proposed preliminary injunction for entry by the court.

Dated October 31, 1974.

BY THE COURT

/s/ Warren K. Urbom

Chief Judge

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-601

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 501 F. 2d 908. The opinion of the district court (Pet. App. A) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. C) was entered on July 24, 1974. A timely petition for rehearing was denied on August 27, 1974. The petition for a writ of certiorari was filed on November 16, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the doctrine of primary jurisdiction requires a district court to suspend proceedings in a suit commenced by the Commission to enjoin an unauthorized abandonment, until the Commission has considered the merits of the railroad's pending abandonment application.

2. Whether the Commission may seek to enjoin an unauthorized abandonment without first ordering another carrier to undertake the abandoned service.

STATUTES INVOLVED

Sections 1(18) and 1(20) of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 1, *et seq.*, and Section 601(e) of the Regional Rail Reorganization Act of 1973, 87 Stat. 1021, are set out in the petition for a writ of certiorari (Pet. 3-7).

STATEMENT

This case involves the unauthorized abandonment of operations over a thirty-nine mile line of track in Nebraska (the Ruskin Line) by petitioner Chicago, Rock Island & Pacific Railroad Co. (Rock Island). For several years the Rock Island had contemplated seeking authorization from the Commission to abandon the Ruskin Line, although that line consistently returned a profit (Pet. App. B, pp. 26-28). The Rock Island accordingly reduced the line's maintenance expenditures to the point where it was in "deplorable condition" (*ibid.*). Unusual weather conditions in the winter of 1973 rendered the deteriorating track unsafe and led petitioner to terminate service over the Ruskin Line on March 2, 1973 (Pet. App. B, pp. 24-26).

Although weather conditions would have permitted restoration of the line to operable condition in May or

June 1973, the Rock Island made no attempt to repair the line (Pet. App. F, pp. 57-58), and on May 5, 1973, the Nebraska Public Service Commission filed suit under Section 1(20) of the Interstate Commerce Act, seeking to enjoin the abandonment unless appropriate permission were obtained from the Interstate Commerce Commission. The Rock Island subsequently filed an application with the Commission seeking authority to abandon the line. The Commission commenced proceedings in regard to that application; in August 1973, the Commission also filed suit under Section 1(20) seeking an injunction to compel Rock Island to restore service pending a final determination of its abandonment application.

The Commission's suit was consolidated with Nebraska's suit. The district court indicated that it was "inclined to the view that there has been an unlawful abandonment * * * as of about May or June, 1973, when weather conditions would have permitted a restoration but the railroad company decided not to restore it for financial reasons" (Pet. App. A, p. 20). However, the district court concluded that the doctrine of primary jurisdiction required it to stay its hand until factual and legal issues concerning the propriety of the abandonment had been submitted to the Commission. Accordingly, it dismissed the actions pending the outcome of the abandonment proceedings before the Commission (Pet. App. A, pp. 20-21).

The court of appeals held that the doctrine of primary jurisdiction ordinarily is inapplicable to actions brought under Section 1(20), and that nothing in the facts of this case altered that outcome (Pet. App. B, pp. 28-30). It remanded the case to the district court "to make factual findings and determine in the first instance whether an injunction should issue" (Pet. App. B. p. 31).

The Rock Island filed a petition for rehearing (Pet. App. D, pp. 41-49), alleging for the first time that Section 601(e) of the Regional Rail Reorganization Act of 1973, amending Section 1(16) of the Interstate Commerce Act, was "an additional reason" why the primary jurisdiction doctrine should be invoked (Pet. App. D, p. 47). The court of appeals denied the petition without opinion.

On October 31, 1974, the district court concluded on remand that the Rock Island "abandoned the branch line with intent not to return it to use unless ordered to do so"; that the abandonment had resulted and will result in substantial and irreparable harm to shippers; and that the failure to restore service on the Ruskin Line "was not for reasons entirely beyond the railroad company's control" because the Rock Island had continued to make a profit on this line while failing adequately to maintain the facilities (Pet. App. F, pp. 58-61). The court consequently held that service should be restored.[1]

On December 13, 1974, the district court denied the Rock Island's motion for stay or, in the alternative, for leave to offer additional evidence. The court then entered a preliminary injunction that ordered the Rock Island forthwith to make repairs necessary to restore service over the line at least as satisfactory as that provided just prior to cessation of service.

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[1]The petition for a writ of certiorari to review the judgment of the court of appeals was filed after the district court's decision on remand.

ARGUMENT

1. It has long been established that it is exclusively for the courts to determine whether an unlawful abandonment has occurred, and whether it should be enjoined; "[t]he remedy provided by § 1(20) is clearly inconsistent with a proceeding before the commission to attain the same end." *Powell v. United States*, 300 U.S. 276, 288. Section 1(20) provides that an injunction may issue if the carrier has abandoned without the Commission's permission. The threshold issues are whether there has been an abandonment, and whether the Commission has authorized that abandonment. Neither factor calls for the exercise of the Commission's expertise, nor is there a role for the Commission's judgment, which is confined (under Section 1(18)) to determining whether an application for abandonment is consistent with the public convenience and necessity. Therefore the courts consistently have decided all questions relating to the issuance of a Section 1(20) injunction without referring them to the Commission. See, *e.g.*, *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U.S. 266, 271-274; *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U.S. 299; *Meyers* v. *Jay Street Connecting R.R.*, 259 F. 2d 532 (C.A. 2). And, indeed, as the court below recognized (Pet. App. B, p. 28), that a Section 1(20) "suit may be maintained at the instance of the Commission is a strong indication that such matters are properly determined by the courts." Referral to the Commission under the primary jurisdiction doctrine is not appropriate.[2]

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[2]The decision of the court below that the doctrine of primary jurisdiction is not applicable is consistent with other recent lower court decisions. See *Interstate Commerce Commission* v. St. Johnsbury & L.C.R.R., Civ. No. 73-3 (D. Vt., decided January 31, 1973); *Interstate Commerce Commission* v. *Maine Central R.R. Co.*, Civ. 74-81 (D. Vt., decided July 18, 1974); *Interstate Commerce Commission* v. *Maine Central R.R. Co.*, No. 74-2062 (C.A. 2, decided October 22, 1974).

The decision in *United States* v. *Western Pacific Railroad,* 352 U.S. 59, is not to the contrary. There the Court held that primary jurisdiction applies when "enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body * * *" (*id.* at 63-64). But here, the court of appeals properly concluded, "there are no issues requiring the views of the administrative agency" (Pet. App. B, p. 30). The only legal issue presented—whether there has in fact been an abandonment—is a question for the courts. So, too, the factors relating to the district court's discretionary decision whether to issue an injunction, including the strong congressional policy and substantial public interest in not permitting abandonment of railroad service without Commission approval, the equity of requiring expenditures when the Commission may subsequently approve the abandonment application, and the deliberate neglect of essential maintenance by the railroad (*id.* at 31-34), are not matters in regard to which the Commission has any special expertise.

Moreover, application of the primary jurisdiction doctrine to Section 1(20) cases would render Section 1(20) meaningless, since a formal Commission decision on whether abandonment should be authorized would be required before any injunctive relief could be entered and in the interim rail operations would cease. Section 1(18) was intended to reflect quite the contrary rule: abandonment was forbidden until the Commission found that it should be authorized. Section 1(20) allows the courts to enforce that rule. Application of the primary jurisdiction doctrine would preclude such interim enforcement.

2. Petitioner also contends that Section 601(e) of the Regional Rail Reorganization Act of 1973 affects the present proceeding. Petitioner apparently believes that because Congress has authorized the Commission, in its own discretion and on its own initiative, to provide for a brief period of emergency service when, among other things, a railroad's cash position makes it impossible to continue operations, Congress has altered the definition of "unlawful abandonment."

This case, however, does not fall within the terms of Section 601(e). That section applies only when continuing operation of a line becomes "impossible" because of the railroad's inability to operate. But petitioner does not contend that restoration of service over the Ruskin Line would be impossible; it simply asserts that restoring service is "economically unfeasible" (Pet. 15). The feasibility of restoring service, balanced against petitioner's neglect (which has increased the cost of restoration), is a factor to be considered in determining whether the district court should issue an injunction (Pet. App. B, pp. 33-35). But because the question in this case is one of economic priorities rather than of operational impossibility, Section 601(e) is inapplicable.

Moreover, there is nothing in the statute or the legislative history to support Rock Island's contention that Section 601(e) modifies the standards for issuing a Section 1(20) injunction. The purpose of Section 601(e) was to avoid "transportation chaos and economic disaster" by assuring "the continuance of essential rail service in the Northeast and Midwest region in case one or more of the seven railroads presently in reorganization under section 77 of the Bankruptcy Act ceases operations prior to the adoption, approval, and implementation of the final system plan" (S. Rep. No. 93-601, 93d Cong.,

1st Sess. 52, 53). Although the inclusion of this statutory provision in the Interstate Commerce Act may well give the Commission the same authority to cope with future transportation emergencies, it is limited to situations where the economic collapse of a railroad, or some other disaster, brings about the cessation or major disruption of a railroad's operations. The statute has no application to the unlawful abandonment of a single branch line by an operating railroad, which abandons the line because of its desire to save money.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

FRITZ R. KAHN,
General Counsel,

BERNARD A. GOULD,
Director, Bureau of Enforcement,
BETTY JO CHRISTIAN,
Associate General Counsel,

THEODORE C. KNAPPEN,
DONALD E. SEGAL,
Attorneys,
Interstate Commerce Commission.

FEBRUARY 1975.

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[3]In any event, the remedy under Section 601(e) lies within the Commission's discretion. By bringing this suit the Commission has elected to pursue its remedies under Section 1(20) rather than exercise whatever options it may have had under Section 601(e). Petitioner is not entitled to set up this election as a defense to the Section 1(20) action.